Ogedegbe Imoukhuede Rawlings v Lingeswaran a/l Muniandy

HIGH COURT (KUALA LUMPUR) — CIVIL APPEAL NO WA-12BNCvC-14–02 OF 2016
YEOH WEE SIAM J
6 MAY 2016

Damages (Personal Injury or Death) — Personal injuries — Appeal against award made — Award of RM60,000 for plaintiff's upper brachial plexus palsy — Whether award reasonable and appropriate — Whether defendant's specialist report rebutted finding in specialist report by plaintiff's doctor that plaintiff still suffered from partial palsy of right brachial plexus — Whether award of one-third of RM30,000 for future surgery in private hospital speculative — Whether there was evidence plaintiff required future surgery — Loss of future earnings — Whether formula adopted by trial judge to calculate future earnings correct — Whether appellate interference necessary

On 12 February 2013, when the plaintiff/respondent ('the plaintiff') had stopped his motorcycle by the side of the highway to take shelter from the rain, he was knocked down by a motorcar driven by the defendant/appellant ('the defendant'). As a result of the accident the plaintiff suffered personal injuries to his right shoulder and right arm. The plaintiff filed a civil suit against the defendant claiming general damages. At the trial before the sessions court judge the defendant admitted to liability of 90%. The trial judge then proceeded to hear the case regarding quantum only and awarded the plaintiff RM60,000 for his upper brachial plexus palsy, the sum of one-third of RM30,000 for future surgery in a private hospital and in respect of loss of future earnings a sum of two-thirds of his last drawn salary of RM2,000 for 16 years (RM255,999.96). The defendant appealed against the amount awarded, while the plaintiff filed a cross-appeal against the decision of the trial judge. The defendant submitted that as the plaintiff was able to move his right hand to the level of his stomach an award of RM50,000 would be reasonable for the plaintiff's upper brachial plexus palsy. The defendant also argued that as the plaintiff had already paid RM6,509 for the surgery in Selayang Hospital it was speculative for the trial judge to award a further RM30,000 for future surgery in a private hospital. In relation to the award for loss of future earnings, the defendant submitted that the award under this head was unreasonable since the plaintiff returned to work after the accident, and also obtained a salary increment thereafter.

Held, dismissing the appeal and cross-appeal with each party to bear his own costs:

(1) From the specialist reports it was clear that the trial judge was correct in concluding that the defendant's specialist report was inconsistent with itself. It would also appear that the defendant had misunderstood the defendant's specialist report on the actual condition of the plaintiff. As it was the right brachial plexus of the plaintiff that was the issue and not the right elbow, it was erroneous of the defendant to submit that the plaintiff's power of the right brachial plexus was 4, when it was actually 3. According to the guide on muscle power referred to in this case, having a muscle power of 3 meant that the plaintiff's movement could overcome gravity but had no resistance and the awards for this injury were in the range of RM44,000–RM71,500. In the circumstances the amount of RM60,000 awarded by the trial judge was not only reasonable but most appropriate. This was in view of the fact that the plaintiff's specialist found the plaintiff to be still suffering from partial palsy of the right brachial plexus and unable to lift heavy objects and do heavy work. Further, there was no specialist report from the defendant to rebut the specialist report by the plaintiff's doctor on this finding (see paras 12–14 & 16–18).

(2) Although the defendant submitted that the award of one-third of RM30,000 for future surgery in a private hospital was speculative, he did not adduce any evidence to show that the plaintiff did not need surgery in future. On the other hand, there was evidence from the plaintiff's doctor which confirmed the plaintiff's need for a different kind of surgery in the future ie brachial plexus exploration, nerve grafting or neurotisation. It was also noted that if the future surgery costing RM30,000 did not give encouraging results, the plaintiff would require further treatment, which in turn would incur further costs. Therefore, the trial judge was in fact rather careful and conservative to grant an award of only RM30,000 for the plaintiff's future surgery in a private medical centre and there was no reason for appellate interference with this decision (see paras 20–23).

(3) Although the trial judge had erred by concluding that the plaintiff was told by his employer to stop work, the trial judge had correctly considered the current situation of the plaintiff ie that he was now a disabled person and carried an OKU (*orang kurang upaya*) card. The trial judge had also correctly weighed the fact that the plaintiff could no longer work like before the accident. Upon considering the scope of the plaintiff's work, his difficulty in carrying out personal tasks such as dressing and cleaning himself and his inability to obtain jobs the trial judge had not erred in awarding the loss of future earnings according to the formula adopted by him (see paras 27–32).

[Bahasa Malaysia summary

Pada 12 Februari 2013, apabila plaintif/responden ('plaintif') telah memberhentikan motorsikalnya di tepi lebuhraya untuk berteduh daripada hujan, dia telah telah dilanggar oleh motorvan yang dipandu oleh defendan/perayu ('defendan'). Akibat kemalangan itu plaintif mengalami kecederaan peribadi di bahu kanan dan lengan kanannya. Plaintif telah memfailkan guaman sivil terhadap defendan menuntut ganti rugi am. Semasa perbicaraan di hadapan hakim mahkamah sesyen defendan mengakui liabiliti 90%. Hakim perbicaraan kemudian meneruskan untuk mendengar kes berkenaan kuantum sahaja dan mengawardkan plaintif RM60,000 untuk brachial plexus palsy bahagian atasnya, sejumlah sepertiga daripada RM30,000 untuk pembedahan masa hadapan di hospital swasta dan berkenaan kehilangan pendapatan masa hadapan sejumlah dua pertiga daripada gaji terakhir yang diperolehinya iaitu RM2,000 selama 16 tahun (RM255,999.96). Defendan telah merayu terhadap jumlah yang diawardkan, manakala plaintif telah memfailkan rayuan balas terhadap keputusan hakim perbicaraan. Defendan berhujah bahawa oleh kerana plaintif mampu menggerakkan tangan kanannya sehingga perutnya award RM50,000 adalah munasabah untuk brachial plexus palsy bahagian atas plaintif. Defendan juga berhujah bahawa oleh kerana plaintif telahpun membayar RM6,509 untuk pembedahan di Hospital Selayang ia adalah spekulatif untuk hakim perbicaraan mengawardkan selanjutnya RM30,000 untuk pembedahan masa hadapan di hospital swasta. Berhubung award untuk kehilangan pendapatan masa hadapan, defendan berhujah bahawa award di bawah kepala ini tidak munasabah kerana plaintif telah kembali bekerja selepas kemalangan itu, dan juga telah memperoleh kenaikan gaji selepas itu.

Diputuskan, menolak rayuan dan rayuan balas di mana setiap pihak menanggung kosnya sendiri:

(1) Berdasarkan laporan pakar ia jelas bahawa hakim perbicaraan adalah betul dalam membuat kesimpulan bahawa laporan pakar defendan tidak konsisten dengan sendirinya. Ia juga kelihatan bahawa defendan telah salah memahami laporan pakar defendan tentang keadaan sebenar plaintif. Oleh kerana brachial plexus kanan plaintif yang menjadi isu dan bukan siku kanan, adalah salah untuk defendan berhujah bahawa tahap kawalan plaintif terhadap brachial plexus kanan adalah 4, sedangkan ia sebenarnya 3. Menurut panduan tahap kawalan otot yang dirujuk dalam kes ini, mempunyai tahap kawalan otot iaitu 3 bermaksud bahawa pergerakan plaintif boleh mengatasi graviti tetapi tiada ketahanan dan award untuk kecederaan ini adalah dalam julat RM44,000–RM71,500. Dalam keadaan itu jumlah RM60,000 yang diawardkan oleh hakim perbicaraan bukan sahaja munasabah tetapi amat sesuai. Ini adalah berdasarkan fakta bahawa ahli pakar plaintif mendapati plaintif masih mengalami sebahagian palsy di bahagian kanan brachial plexus dan tidak

mampu mengangkat objek berat dan membuat kerja berat. Selanjutnya, tiada laporan pakar daripada defendan untuk mematahkan laporan pakar oleh doktor plaintif tentang penemuan ini (lihat perenggan 12–14 & 16–18).

(2) Walaupun defendan berhujah bahawa award satu pertiga RM30,000 untuk pembedahan masa hadapan di hospital swasta adalah spekulatif, dia tidak mengemukakan apa-apa keterangan untuk menunjukkan bahawa plaintif tidak memerlukan pembedahan di masa hadapan. Sebaliknya, tiada keterangan daripada doktor plaintif yang mengesahkan keperluan plaintif untuk pembedahan jenis lain di masa hadapan iaitu pemeriksaan teliti brachial plexus, menggraf saraf atau neurotisian. Ia juga mendapati bahawa jika perbelanjaan pembedahan masa hadapan iaitu RM30,000 tidak memberikan hasil yang memberansangkan, plaintif akan memerlukan rawatan selanjutnya, yang sebaliknya akan menyebabkan kos selanjutnya. Oleh itu, hakim perbicaraan sememangnya amat berhati-hati dan konservatif untuk memberikan award untuk hanya RM30,000 bagi pembedahan masa hadapan plaintif di pusat perubatan swasta dan tiada sebab untuk campur tangan pihak rayuan dengan keputusan ini (lihat perenggan 20–23).

(3) Walaupun hakim perbicaraan terkhilaf dalam memutuskan bahawa plaintif telah diberitahu oleh majikannya untuk berhenti bekerja, hakim perbicaraan telah sewajarnya mempertimbangkan keadaan semasa plaintif iaitu yang dia kini orang kurang upaya dan membawa kad OKU (orang kurang upaya). Hakim perbicaraan juga dengan betul telah mengimbang fakta bahawa plaintif tidak boleh lagi bekerja seperti sebelum kemalangan. Setelah mempertimbangkan skop kerja plaintif, kesukarannya menjalankan tugas peribadi seperti memakai baju dan membersihkan diri sendiri dan ketidakupayaannya mendapat pekerjaan hakim perbicaraan tidak terkhilaf dalam mengawardkan kehilangan pendapatan masa hadapan menurut formula yang digunakan oleh beliau (lihat perenggan 27–32).]

Notes

For cases on appeal against award made, see 6(1) *Mallal's Digest* (5th Ed, 2015) paras 672–674.

J Vijayakumar (Sarbjit & Assoc) for the appellant.
D Dhayalini (G Dorai & Co) for the respondent.

Yeoh Wee Siam J:

BRIEF FACTS

[1] On 12 February 2013 the respondent/plaintiff ('the plaintiff'), while on his motorcycle and taking shade from the rain by the side of the highway, was knocked down by the appellant/defendant ('the defendant') who was driving his motorcar.

[2] As a result of the accident, the plaintiff suffered the following injuries:

(a) right acromio clavicular dislocation;

(b) fracture of right fibula;

(c) laceration of right elbow; and

(d) upper brachial plexus palsy.

[3] The plaintiff filed a civil suit against the defendant in the Kuala Lumpur Sessions Court ('sessions court') claiming general damages, interests and costs.

[4] The defendant admitted to liability of 90% at the sessions court. The learned sessions court judge ('judge') proceeded to hear the case regarding quantum only.

APPEAL TO THE HIGH COURT

[5] The appeal by the defendant to the High Court was in respect of the issue of quantum.

[6] The plaintiff also filed a cross appeal regarding the decision of the judge.

HIGH COURT'S DECISION GIVEN ON 13 APRIL 2016

[7] After hearing the defendant's appeal and the plaintiff's cross appeal on 13 April 2016, I affirmed the decision of the judge. I therefore dismissed the defendant's appeal and the plaintiff's cross appeal respectively, and ordered each party to bear his own costs.

THE DEFENDANT'S APPEAL TO THE COURT OF APPEAL

[8] The defendant's appeal to the Court of Appeal is only in respect of part of my decision dated 13 April 2016 ie on the following issues on quantum:

(1) Kehilangan Pendapatan sebanyak 2/3 x RM2,000 x 16 tahun = RM255,999.96 adalah munasabah, walaupun Responden/Plaintif telah kembali bekerja selepas kemalangan dan juga mendapat kenaikan gaji selepas kemalangan;

(2) Jumlah award RM60,000 adalah munasabah untuk upper brachial plexus walaupun pihak Responden/Plaintif mengalami hanya partial brachial plexus mengikut laporan pakar Defendan;

(3) Jumlah 1/3 x RM30,000 untuk kos pembedahan masa hadapan di hospital swasta adalah munasabah walaupun Responden/Plaintif telah menjalani pembedahan di hospital Selayang.

GROUNDS FOR THE HIGH COURT'S DECISION

[9] I shall deal with issues (2) and (3) first, to be followed by issue (1).

Issue (2): Award of RM60,000 for upper brachial plexus palsy is reasonable even though the plaintiff had suffered only partial brachial plexus palsy according to the defendant's specialist report

[10] It is noted that the judge rightly considered the specialist reports produced by the plaintiff and defendant respectively:

The plaintiff's specialist report by Dr Jeyaratnam ('Dr Jeya' or 'the plaintiff's doctor') dated 17 August 2013 and updated and clarified on 15 December 2015:

> I have re-examined Lingeswaran on 13th Disember 2014. I find his right shoulder still weak with muscle power of 2/5. The function of his right lower limb was compromised. He could not use the right upper limb to eat nor groom himself. He was using his left upper limb for this. The patient is also unable to use his right upper limb to lift heavy objects and do heavy work. He could not ride his motorcycle or drive a car. Vehicle modification may be required. Since it has been more than 20 months since the injury, this disability is permanent. (RR p 86);

The defendant's specialist report by Professor Dr Vivek Ajit Singh ('Dr Vivek' or 'the defendant's doctor') dated 17 December 2014:

> The right should is weak and power is grade 3, while the right elbow is grade 4, with full function of the right hand and wrist. There is reduced sensation at C5. Therefore, patient's right plexus injury has not fully resolved and there is partial plexus deficit considering the duration after injury. This is unlikely to recover. Patient will have difficulty carrying out over head activities with right upper limb and carrying heavy things (RR p 151).

[11] The judge then referred to the *UK Medical Research Council for muscle power* for the guide on muscle power according to the following scale:

0-	No muscle contraction is visible
1-	Muscle contraction is visible but there is no movement of joint
2-	Active joint movement is possible with gravity eliminated
3-	Movement can overcome gravity but no resistance from examiner
4-	The muscle group can overcome gravity and more against some resistance from examiner
5-	Full and normal power against resistance.

[12] From the specialist reports, the judge was correct in concluding that the defendant's specialist report was inconsistent with itself. While it stated that the plaintiff's muscle power for his right shoulder is 3/5, instead of 2/5 as found by the plaintiff's doctor, the defendant's doctor went on to say that 'the right shoulder is weak, and the power is grade 3, while the right elbow is grade 4 with full function of the right hand and wrist'.

[13] It appears to me that the defendant had misunderstood the defendant's specialist report on the actual condition of the plaintiff. The right brachial plexus of the plaintiff is the issue, and not the right elbow, which has a muscle power of four, and which has gained full function. It is therefore erroneous for the defendant to submit that the plaintiff's power of the right brachial plexus is four, when it is actually three. According to the above guide on muscle power, it is noted that by having a muscle power of three, the plaintiff's movement can overcome gravity but has no resistance.

[14] The judge considered the *Compendium of Personal Injury Awards Revised 2014* p 16 for injury to the brachial plexus upper limb to be in the range of RM44,000 – RM71,500.

[15] The defendant submitted before me that an award of RM50,000 for the plaintiff's upper brachial plexus palsy is reasonable, and not the RM60,000 as awarded by the judge. The defendant highlighted the latest photograph of the plaintiff ('RR p 83') which shows that the plaintiff is able to his right hand to the level of his stomach.

[16] I am of the view that the amount of RM60,000 awarded by the judge is not only reasonable, but most appropriate. This is in view of the fact that the plaintiff is still suffering from partial palsy of his right brachial plexus to the extent that he is unable to lift his right hand from the level of his stomach to his shoulder or head. That is a drastic disability. As stated by the plaintiff's doctor in his specialist report, the plaintiff is unable to lift heavy objects and do heavy

work. He could not ride a motorcycle or drive a car. With a muscle power of only 3/5, the plaintiff has a long way to go before he can reach the full muscle power of 5/5.

[17] There is no specialist report from the defendant to rebut the specialist report by the plaintiff's doctor that 'Since it has been more than 20 months since the injury, this disability is permanent'. In fact, the defendant's own doctor confirmed what the plaintiff's doctor stated by saying, '... there is partial plexus deficit considering the duration after the injury. This is unlikely to recover'.

[18] I am therefore of the firm view that the judge's award of RM60,000 under this head should be upheld.

Issue (3): Amount of RM1/3 x RM30,000 for future surgery in a private hospital is reasonable even though the plaintiff already had surgery in Selayang Hospital before

[19] The defendant submitted that the plaintiff has already paid RM6,509 for the surgery in Selayang Hospital. Upon a perusal of the letter dated 8 June 2015 from Selayang Hospital to the plaintiff ('RR p 137'), it is clear that the plaintiff underwent an operation for 'Arthroscopic adhesiolysis, decompression and repair' since he suffered from 'rotator cuff injury with impingement' at his right shoulder ('RR p 137'). The quotation annexed by Selayang Hospital amounted to RM6,509 for 'shoulder Arthroscopy Surgery'. However, in the letter itself it is stated that the implant and equipment for surgery as stated in the quotation would not be supplied by the hospital. This means that the total cost of surgery at Selayang Hospital, together with the implant and equipment for surgery ('equipment') would be more than RM6,509. Be that as it may, it is noted that no evidence was adduced on the actual total cost of the plaintiff's surgery at Selayang Hospital. It is reasonable to conclude that it would be more than RM6,509, if the costs of the implant and equipment are added to it.

[20] The defendant submitted that it is speculative for the judge to award 1/3 out of RM30,000 for the plaintiff's future surgery at at private hospital. However, there is no evidence adduced by the defendant to show that the plaintiff does not need surgery in future. On the other hand, there is evidence from the plaintiff's doctor which confirms the plaintiffs need for a different kind of surgery in the future ie brachial plexus exploration, nerve grafting or neurotisation. The plaintiff's doctor stated, inter alia, as follows in the 'Summary' of his specialist report:

> He also sustained a right upper brachial plexus injury which rendered his right upper limb less useful as he is unable to carry weights, ride motorcycle or drive. He requires a brachial plexus exploration, nerve grafting or neurotization surgery to

rectify this problem. However, he may eventually require further surgery as the results of the above mentioned surgery are not very encouraging or consistent.

...

Even with best effort, some amount of deficit and disability is expected to remain. (RR p 80).

[21] The judge appropriately considered the following assessment of the plaintiff's doctor on the costs involved in the plaintiff's future surgery at private hospital:

... The patient will require brachial plexus exploration, nerve grafting or neurotisation surgery to rectify this problem. This will cost RM30,000 in a private medical centre.

However, the results of this surgery are not encouraging or consistent. If there is no functional improvement after this surgery then the patient will require an arthrodesis of his right shoulder in a functional position. Even the best results, the function of the right limb will not be normal again.

[22] It is to be also noted that if future surgery, which would cost RM30,000, does not give encouraging or consistent results, then the plaintiff would require further treatment ie arthrodesis of his right shoulder in a functional position. This would incur further costs.

[23] Therefore, in my view the judge was in fact rather careful and conservative to grant an award of only 1/3 of RM30,000 for the plaintiff's future surgery in private medical centre. There is no good reason for this appellate court to interfere with such a decision.

Issue (1): Loss of future earnings of 2/3 x RM2,000 x 16 years = RM255,999.96

[24] The defendant submitted that the award under this head is unreasonable since the plaintiff returned to work after the accident, and also obtained a salary increment thereafter.

[25] The defendant contended that the plaintiff returned to work on 1 June 2013 and obtained an increment on 1 March 2014. The plaintiff was given medical benefits and other allowances after he returned to work at his company ('RR p 30'). Subsequently, the plaintiff stopped work voluntarily and not as directed by his employer.

[26] From the evidence of the plaintiff's employer ('PW1'), it is clear that the plaintiff went back to work on 1 June 2013 and worked for nearly 1½ years before the plaintiff voluntarily resigned. The plaintiff was drawing a salary of RM1,750 per month, but effective from 1 March 2014 the plaintiff had an

increment due to salary adjustment which resulted in the plaintiff's salary being increased to RM2,000 per month. Thus, the judge was correct to use RM2,000 as the plaintiff's last drawn salary as the basis to calculate the plaintiff's loss of future earnings.

[27] The judge considered the evidence of the plaintiff ('PW2') that he was directed by his employer to stop work. The defendant contended that there is no proof regarding this. PW1 confirmed that the plaintiff stopped work voluntarily. A perusal of the notes of evidence ('NOE') shows that the plaintiff's employer did not ask the plaintiff to stop work. However, the plaintiff in his re-examination stated that he received oral warnings by telephone from his employer for being late to work. Thus, the judge did err in fact by concluding that the plaintiff was told by his employer to stop work.

[28] However, the judge correctly considered the current situation of the plaintiff that the plaintiff is now a disabled person and carries an OKU ('Orang Kurang Upaya') card. The judge correctly weighed the fact that the plaintiff can no longer work like before the accident. The plaintiff testified that his hand injury got worse with time and was swollen and painful. Due to his disability, the plaintiff could not do heavy work, especially with a muscle power which improved from 0/5 to 2/5. The judge also considered the scope of the plaintiff's work.

[29] From the NOE, it is noted that PW1 confirmed that the plaintiff's work was not only supervising, but the plaintiff often had to step in, when there is a lack of staff, to do other work. The plaintiff under cross-examination stated that sometimes if the bulb fused or the air conditioner was not working at the cinema/work place, the plaintiff had to climb and fix the problem if the technician is not around. The plaintiff had to assist in carrying sacks of food for sale at the cinema if there are not enough workers.

[30] The plaintiff needed assistance in personal dressing eg buttoning his shirt, and going to the toilet. He had difficulty in cleaning himself after a bowel movement because his right hand could not reach his bottom, and he needed the other hand to carry the pail. The plaintiff can no longer ride a motor cycle or drive a car. As a result, in order to go to work daily, he needs a lift to go to the KTM railway station. That is the reason why he was often late to work and had received oral warnings from his employer.

[31] The plaintiff stated that he applied for several jobs closer to his house but when he disclosed that he had a shoulder handicap he could not get a job.

[32] Based on the evidence in totality, I do not think that the judge had erred in awarding the loss of future earnings according to the above formula adopted by him.

DECISION

[33] After considering both the defendant's appeal and the respondent's cross appeal, I am of the opinion that the judge did not err in fact (except for the finding that the plaintiff was told by his employer to stop work) or in law. As such, there is no reason for me to interfere with his decision.

[34] Going by the above considerations, I therefore ordered accordingly.

Appeal and cross-appeal dismissed with each party to bear his own costs.

Reported by Kohila Nesan